2016

Patrick Liley, Plaintiff and Appellee, v. Utah Department of Transportation, a Division of the State of Utah, Juab County, a Political Subdivision of the State of Utah, Sanpete County, a Political Subdivision of the State Ofutah, Cedar Springs Ranch, Inc.

Utah court of Appeals

IN THE UTAH COURT OF APPEALS

PATRICK LILEY, Plaintiff and Appellee, v. UTAH DEPARTMENT OF TRANSPORTATION, a division of the State of Utah, JUAB COUNTY, a political subdivision of the State of Utah, SANPETE COUNTY, a political subdivision of the State of Utah, **CEDAR SPRINGS RANCH, INC.**, a Utah corporation, and DALE DORIUS, an individual, Defendant and Appellant.	Case No.: 20150267-CA

Reply Brief of Appellant

Appeal from Judgment Entered by the Fourth Judicial District Court,
Honorable Jennifer A. Brown

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As pointed out in Cedar Springs' opening brief, there are only three possible legal bases upon which Cedar Springs could have owed a duty to Liley. As a matter of law, none of these bases was properly established at trial in this case, and the district court committed reversible error in its rulings.

I. AS A MATTER OF LAW, SECTION 41-6a-407(1)(a) DID NOT IMPOSE A DUTY ON CEDAR SPRINGS AS LANDLORD.

The meaning of a statute is for the court, not the jury to decide. In its summary judgment motion, Cedar Springs properly raised issues regarding the meaning of Utah Code Ann. § 41-6a-407(1)(a). The district court therefore erred in denying that motion.

Liley argues that the district court denied Cedar Springs' motion because there were disputed issues of fact that needed to be decided by the jury, but this is incorrect. The district court denied the motion based on the legal ruling that Cedar Springs owed a duty to control its tenant and that this duty was somewhat greater because Cedar Springs and its tenant were related corporations. However, the case did not proceed to trial on this basis. Rather, the district court allowed the case to proceed on the legal basis that "the rule is if you're in control of livestock *means it's in your property.*" R. 864 at 94:8-9 (emphasis added). Liley's counsel was allowed to further tell the jury that "[t]he owner of the property is responsible to make sure that they take reasonable care in maintaining their fences." R. 864 at

94:25 to 95:2. But this is not what the statute says. The statute places responsibility on a party who "owns or is in possession or control of any livestock." The question thus becomes whether a landlord possesses or controls cows owned by its tenant. The jury was told that—as a matter of law—the owner of real property does control cows if the cows are on its property. This was error.

Liley argues that Cedar Springs waived its right to appeal from the district court's legal errors because it did not object at trial. However, counsel for another defendant made an objection that could not have been clearer. He stated, "Object, Your Honor. He's arguing the law, and it's a complete misstatement of the law, Your Honor." R. 864 at 97:4-6. Before counsel for Cedar Springs had a chance to formally join the objection, the district court ruled. The district court indicated that defense could make their own legal arguments to the jury. This was, of course, error. Parties do not make legal arguments to juries, and juries are not allowed to rule on the meaning of a statute. However, once the district court ruled, it was not necessary or appropriate for the defendants to pepper the court with additional objections. Such an approach is disrespectful to the court and would prejudice the defendants by making them appear obstreperous in the eyes of the jury.

To preserve an issue for appeal, the issue must be presented to the trial court in such a way that the court has an opportunity to rule on the issue. *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801, 813. "This requirement puts the

trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding." *Id.* This requirement was satisfied in this case when counsel for a co-defendant clearly brought the issue to the district court's attention and thus allowed the district court to correct the error.

Utah courts will not require a party to make "futile objections." *State v. Bird*, 2012 UT App 239, ¶ 12, 286 P.3d 11, 14; *see also State v. Ashcraft,* 2015 UT 5, ¶ 33, 349 P.3d 664, 671 (ruling that because "it would have been futile for [a party] to have preserved a specific objection in the district court" the party should be excused "from his failure to do so"). Here a "me too" objection in the part of Cedar Springs would have been futile because the district court had already ruled on the issue. Utah courts do "not require a party to continue to object once a motion has been made, and the trial court has rendered a decision on the issue." *State v. Hoffhine*, 2001 UT 4, ¶ 14, 20 P.3d 265.

The same arguments apply to the legal arguments made by Liley's counsel in his closing argument. Any objection would have been the precise objection already made during opening argument that the plaintiff's counsel was instructing the jury on the law. Because the judge had already clearly ruled on this issue, such an objection would have been futile, unnecessarily repetitious, and unnecessarily disruptive in the eyes of the jury (which was well aware of the district court's previous ruling on this issue).

Finally, because an objection was actually raised, albeit by a co-defendant, the policies behind preservation were met here: (1) the argument was presented to the court, (2) the court had an opportunity to rule on the issue, (3) the trial judge was on notice of the asserted error, and (4) the trial judge was allowed an opportunity to correct that error in the course of the proceeding." *438 Main St.*, 2004 UT 72, ¶ 51.

A California case supports this conclusion. In *People v. Gamache*, one codefendant ("Codefendant A") failed to join the other codefendant's ("Codefendant B") objection during trial because the court ruled on the objection before an opportunity was reasonably provided for Codefendant A to join. 227 P.3d 342, 370 (Cal. 2010). On appeal, appellee argued that because Codefendant A did not join in Codefendant B's objection, Codefendant A could not raise the issue on appeal. *Id.* The California Supreme Court rejected appellee's argument. *Id.* It ruled, "This claim is preserved, as [Codefendant B] objected and the trial court overruled the objection before [Codefendant A] had a chance to join; accordingly, it would have been futile to make the same objection that had just been rejected." *Id.*

In the end, Liley's counsel was allowed to repeatedly instruct the jury that the "safety statute," as he called it, means that if a party owns real property, the party is liable. But this is not what the statute says. The legal meaning of the

statute was properly before the district court in Cedar Springs' motion for summary judgment, and the district court erred in denying that motion. The district court also erred in denying Cedar Springs' motion for a directed verdict.

Cedar Springs is not challenging any factual determination made by the jury. And it is important to note that Liley did not argue or present any evidence at trial that Cedar Springs was liable based upon some *factual* issues regarding Cedar Springs' failure to supervise its tenant. Rather, Liley's argument was a legal one. Liley's argument to the jury was unequivocal: "Our claims are against Cedar Springs because it was *their property*, and the cows were on *their property*, and the safety law in the state says it's *their responsibility*." R. 1453 at 42:16-20 (emphasis added). This is a legal argument. And legal issues should have been decided by the court not the jury.

Furthermore, the problem in this case was compounded in a significant and prejudicial way when Liley's counsel informed the jury that "[i]f you award any percentage of fault to Warm Creek, Patrick Liley can't be compensated for that." R. 1453 at 42:2-4. It is unclear why Liley chose not to sue Warm Creek, but it was his decision, not Cedar Springs'. More importantly, counsel's comment likely led the jury to believe that under the so-called "safety statute," Cedar Springs was liable and that apportioning fault to Warm Creek would deprive Liley of a recovery.

Of course, as stated above, Liley could have presented *factual* evidence regarding the relationship between Cedar Springs and its tenant. But there was no such evidence presented. Instead Liley relied on legal arguments, telling (actually, instructing) the jury what the word "possession" in the statute means: Counsel stated: "Possession is *the cows are on their property*." R. 1453 at 35:23-24 (emphasis added). Counsel continued, "Well, it's your responsibility, Cedar Springs, it's your property, and you have cows on the property. That's what the law says." R. 1453 at 36:16-19. The jury was thus essentially instructed that section 41-6a-407(1)(a) is a strict liability statute for landlords and that ownership of real property is enough to impose *per se* liability under section 41-6a-407(1)(a). However, this is not what the statute says. The legislature could have tied liability to ownership, but it did not do so. It tied liability to control.

The district court erred in not interpreting the law itself, in not ruling that based on the undisputed facts Cedar Springs was not in possession or control of any livestock, and then in allowing the jury to decide what the statute means.

II. THERE WAS NO EVIDENCE AT TRIAL THAT CEDAR SPRINGS OWED OR ASSUMED ANY DUTY OTHER THAN IN ITS CAPACITY AS LANDLORD.

As just discussed, a negligence claim could have been supported on the basis that Cedar Springs assumed some sort of duty to maintain the fences. However, it is undisputed that under the lease agreement between Cedar Springs and Warm Creek, it was Warm Creek's duty to maintain the fences. There was no factual evidence regarding any other duty or any failure to supervise.

Liley argues on appeal that there was not a single one-time lease between Cedar Springs but a series of short-term leases that began each spring and ended each fall. Liley cites to no evidence at trial supporting this factual assertion. Liley merely attacks Dale Dorius's *uncontroverted* testimony by arguing that the testimony was "self-serving" and that the lease was just a "purported" lease. These negative characterizations are insufficient and – ironically – they are themselves "self-serving." Liley was required to come forward with evidence that there was no lease or that there was more than one lease. He did not do so. At trial it was undisputed that the terms of the lease required Warm Creek and not Cedar Springs to maintain the fences.

III. AS A MATTER OF LAW, CEDAR SPRINGS COULD NOT HAVE BEEN HELD LIABLE FOR NEGLIGENT OVERSIGHT BECAUSE THE JURY FOUND THAT WARM CREEK WAS NOT NEGLIGENT.

Finally, as pointed out in Cedar Springs' opening brief, it might be possible to argue that Cedar Springs was required to answer for the negligence of its tenant under the doctrine of respondeat superior or for its own negligence in failing to supervise its tenant. As Liley points out, the district court ruled that Cedar Springs had "some duty to control the actions of its tenant and that this duty was perhaps greater because Cedar Springs and Warm Creek were related corporations. However, even assuming that Cedar Springs was required to control its tenant, there is no evidence that the tenant was negligent. Indeed, the jury found that Warm Springs was 0% responsible for Liley's injuries in this case. Liley does not and cannot challenge this factual finding of the jury. And, as previously pointed out, if Warm Creek was not liable for failing to maintain fences, then there was no negligence on the part of Cedar Springs for failing to supervise Warm Creek.

Liley argues that Cedar Springs did not preserve this argument for appeal because it did not make a JNOV motion at trial. This argument misses the point. Cedar Springs did not disagree with the jury's finding that Warm Springs was not

negligent.[1] Cedar Springs is simply pointing out that the judgment in this case cannot be sustained on the basis of a failure to properly supervise because Cedar Springs' tenant was not negligent.

Liley argues that these issues should have been raised in a JNOV motion so that the matter could have been sent back to the jury. There are several responses to this argument. First of all, as just mentioned, Cedar Springs does not dispute the jury's factual finding that Warm Springs was not negligent. If Liley disputes this factual finding, then Liley, not Cedar Springs, needed to ask the district court to send the matter back to the jury.

Second, there is no Utah case requiring a party to file a JNOV motion in order to preserve an issue for appeal. If such a requirement is to be adopted in Utah, it should be adopted on a prospective basis only. Cedar Springs should be held only to the requirements for preserving an issue for appeal that were part of Utah law at the time of the trial.

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[1] Indeed, there was evidence at trial that there were no holes in the fence on the night of the accident. For example, the highway patrolman who investigated the accident testified that "there wasn't any obvious holes that [he] located." R. 1142 (Vol II) at 89:7-8. In addition, although Liley testified that the cow he hit was headed west (and therefore likely coming from Cedar Springs' property on the east), Liley later adamantly testified that the cow was facing east (and thus coming from someone else's property):

> A. No. I seen the cow in our lane, and we were heading north and the cow was facing east.
>
> Q. How do you know the cow was facing east?
>
> A. Because I know east from west.

R. 864 (Vol. I) at 121:21-23.

Third, requiring a JNOV motion in a case like this is problematic because it is unclear what the district court could have told the jury to do. Was the jury required to change its mind about whether or not Warm Springs was negligent? Cedar Springs was free to accept the jury's factual determination and then to argue resulting legal arguments on appeal.

Fourth, a JNOV motion would have been futile given the district court's prior legal rulings, and Cedar Springs was not required to bring a futile motion in order to preserve an issue for appeal.

Finally, even assuming that a JNOV motion was otherwise required, the district court committed plain error in this case by entering judgment against a landlord when its tenant, which had the duty to maintain fences, was 0% liable for the accident.[2] To show plain error an appellant must establish that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for [the defendant]." *State v. Cruz*, 2005 UT 45, ¶ 16, 122 P.3d 543 (first alteration in original) (internal quotation marks omitted). Here an error existed because a superior party has nothing to answer for if the subservient party was not negligent. This should have been obvious to the trial court. And there is a

[2] The district court also committed plain error by allowing Liley's counsel to instruct the jury about what the statute means.

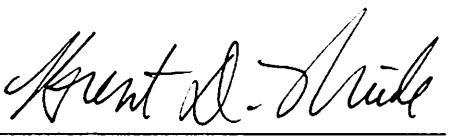
reasonable likelihood that if the law had been properly applied here, there would have been a more favorable outcome for Cedar Springs.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the judgment of the district court.

DATED this 20th day of July, 2016.

RAY QUINNEY & NEBEKER P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, I served two true and correct copies of the foregoing **RELY BRIEF OF APPELLANT** upon the following by United States Mail:

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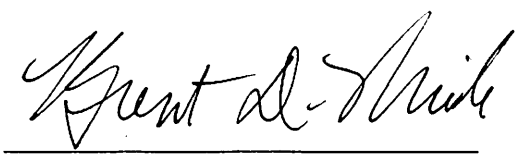

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